Supreme Court, U.S.
FILED
SEP 13 1993
OFFICE

No. _____

In the

Supreme Court of the United States

October Term, 1993

BRAINERD AREA CIVIC CENTER,
BRAINERD AMATEUR HOCKEY ASSOCIATION,
NATIONAL EXCHANGE CLUB OF LITTLE FALLS,
LITTLE FALLS YOUTH HOCKEY ASSOCIATION
SKI GULL, INC., MARCH OF DIMES, CLIMB, INC.,
CEDAR RIVERSIDE PEOPLE'S CENTER AND
EXCHANGE CLUB OF SOUTHWEST MINNEAPOLIS,
Petitioners,

v.

COMMISSIONER OF REVENUE,
STATE OF MINNESOTA,
Respondent.

MINNESOTA MULTIPLE SCLEROSIS SOCIETY AND
EPILEPSY FOUNDATION OF MINNESOTA, INC.,
Petitioners,

v.

COMMISSIONER OF REVENUE,
STATE OF MINNESOTA,
Respondent.

ON WRIT OF CERTIORARI FROM THE
MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Daniel W. Schermer
Counsel of Record
1000 Northstar Center East
608 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-1400

Attorney for Petitioners

September 13, 1993

1993 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTION PRESENTED FOR REVIEW

Whether the Minnesota Supreme Court, by upholding the constitutionality of a Minnesota statute imposing a graduated tax based upon the gross receipts of charitable gambling operations, failed to follow the binding precedent of the decision of the U.S. Supreme Court in Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1934), which held that a graduated tax based on gross receipts is unconstitutional in that such a tax violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

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OPINIONS BELOW

On October 20, 1992, the Minnesota Tax Court denied Petitioners' motion for summary judgment declaring that Minnesota Statute § 349.232, subd. 6 is unconstitutional. The decision of the Minnesota Tax Court is not reported.

On May 7, 1993, the Minnesota Supreme Court, on Writ of Certiorari, affirmed the Minnesota Tax Court's decision. The decision of the Minnesota Supreme Court is reported at 449 N.W.2d 468 (1993) and is shown at Appendix A-1.

JURISDICTION

Petitioners Brainerd Civic Center, *et al.*[1] petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court holding that a Minnesota statute imposing a graduated tax based on gross receipts of charitable gambling operations is constitutional. It is the contention of the petitioners that the decision of the Minnesota Supreme Court is directly contrary to the holding by the this Court in Stewart Dry Goods v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1934). The Stewart Dry Goods case held that graduated taxes based on gross receipts violate the Equal Protection Clause of the Fourteenth Amendment.

The order and opinion of the Minnesota Tax Court in favor of the respondent was entered on October 20, 1992. The judgment of the Minnesota Supreme Court affirming the Minnesota Tax Court's decision was entered on June 15, 1993. Jurisdiction of this Court rests on 28 U.S.C. Section 1257(3).

[1]These cases were consolidated for all purposes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Minnesota Statutes, Section 349.212, subdivision 6 provides as follows:

> **Subd. 6. Combined receipts tax.** In addition to the taxes imposed under subdivisions 1 and 4, there is imposed a tax on the combined receipts of the organization. As used in this section, "combined receipts" is the sum of the organization's gross receipts from lawful gambling less gross receipts directly derived from the conduct of bingo, raffles, and paddlewheels, as defined in section 349.12, subdivision 21, for the fiscal year. The combined receipts of an organization are subject to a tax computed according to the following schedule:

If the combined receipts for the fiscal year are:	The tax is:
Not over $500,000	Zero
Over $500,000, but not over $700,000	Two percent of the amount over $500,000 but not over $700,000
Over $700,000, but not over $900,000	$4,000 plus four percent of the amount over $700,000 but not over $900,000
Over $900,000	$12,000 plus six percent of the amount over $900,000

Minn. Stat. Section 349.212, Subd. 6.[2]

STATEMENT OF THE CASE

The petitioners are charities conducting lawful gaming operations pursuant to Chapter 349 of the Minnesota Statutes. In 1989, the Legislature enacted a "combined receipts" tax, which is a graduated tax levied upon the gross receipts of charitable gaming activities.

Minn. Stat. §349.212, Subd. 6 imposes a graduated tax on the "combined receipts" of each organization engaged in charitable gaming. The term "combined receipts" means "the sum of the organization's gross receipts from lawful gambling less gross receipts directly derived from the conduct of bingo,

[2]It is undisputed that the combined receipts tax is a graduated gross receipts tax.

raffles, and paddlewheels." The tax is graduated as follows:

If the combined receipts for the fiscal year are:	The tax is:
Not over $500,000	Zero
Over $500,000, but not over $700,000	Two percent of the amount over $500,000 but not over $700,000
Over $700,000, but not over $900,000	$4,000 plus four percent of the amount over $700,000 but not over $900,000
Over $900,000	$12,000 plus six percent of the amount over $900,000

Because graduated gross receipts taxes have been held by this Court to be unconstitutional, the instant lawsuit followed.

In the Complaints that initiated these lawsuits, petitioners first raised the federal question of the Equal Protection Clause of the 14th Amendment. The Complaints state, "[t]he said combined gross receipts tax is unconstitutional. Among other things, it violates the Equal Protection Clause of the 14th Amendment to the United States Constitution which provides in pertinent part that, 'no state shall deny any person the equal protection of the laws ... .'" This constitutional question was raised again in petitioners' motion for summary judgment in

the Minnesota Tax Court[3] and also in the appeal to the Minnesota Supreme Court.

REASON FOR GRANTING THE PETITION

By upholding the constitutionality of Minnesota's graduated gross receipts tax, the Minnesota Supreme Court decided a federal question that directly conflicts with the United States Supreme Court's decision in Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1934) holding such taxes to be unconstitutional.

In March of 1930, the Kentucky Legislature enacted a graduated gross receipts tax for all retail businesses in the State of Kentucky. The tax was summarized by this Court as follows:

> The tax imposed upon the first $400,000 of the annual gross sales on each additional $100,000 of sales between $400,000 and $1,000,000, inclusive being seventeen - twentieths of 1 percent in the last bracket. On sales over $1,000,000, the rate is 1 percent ... .

Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 553-554 (1934).[4]

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[3]Under the Minnesota Rules of Civil Procedure, the Tax Court was free to award judgment to the non-moving party. Both sides urged the Tax Court to rule definitively in favor of one party or the other.

[4]This tax was virtually identical to the tax imposed by Minn. Stat. § 349.212, Subd. 6.

The Court in Stewart Dry Goods struck down the Kentucky statute as an unconstitutional violation of the Equal Protection Clause of the 14th Amendment. The Court explained its reasoning as follows:

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably, it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

Id. at 558 (quoting United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328, 38 S.Ct. 499, 62 L.Ed. 1135(1918).) The Court also reasoned:

Argument is not needed ... that the gross receipts of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing rates of profit; and that gross and net profits vary with the character of the business as well as its volume ... . We think the graduated rates imposed were not intended to bear any relation to net profits.

See Stewart Dry Goods Co. v. Lewis, 294 U.S. at 558-559.

Following the Stewart Dry Goods decision, graduated gross receipts taxes were either promptly repealed or were struck down by the courts as being unconstitutional. See, for example, Valentine v. Great Atlantic and Pacific Tea, 299 U.S. 32, 57 S.Ct. 56, 81 L.Ed. 22 (1936); Lane Drug Stores v. Lee, 11 F.Supp. 672 (D.Fla.1935); Great Atlantic Pacific Tea Company v. Harvey, 107 Vt. 215, 177 A.423(1935); Tolerton & Warfield Co. v. Iowa State Board of Assessment and Revenue, 222 Iowa 908, 270 N.W. 427 (1936); and State v. Simpson, 122 Fla. 582, 166 So. 226 (1935), aff'd on rehearing, 122 Fla. 639, 166 So. 249 (1936).

In 1938, this Court again addressed the issue of the constitutionality of graduated gross receipts taxes. Rapid Transit Corp. v. New York, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938). In Rapid Transit, the Court was faced with a claim that all gross receipts taxes are unconstitutional. The Court rejected this claim. At the same time, it reaffirmed its holdings in Stewart Dry Goods, and made it clear that only graduated gross receipts taxes are prohibited. As the Court explained:

> [T]he tax on retailers held invalid in [Stewart Dry Goods] increased in rate with increasing volume. The Court said that the excise was laid upon the making of a sale, and the statute "exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other" (p. 566) ... . The Court did not condemn a fixed-rate gross receipts tax, such as is involved in the present case. Indeed it suggested that the "desired end" might have been secured by the widely adopted "flat tax on sales" (p. 563), and indicated by way of contrast that though such a tax "would impose a heavier burden on the

> taxpayer having the greater volume of sales" the graduated tax under consideration exacted not only a larger gross amount but one "larger in proportion to sales" (p. 564). ——

Rapid Transit Corp. v. New York, supra, 303 U.S. at 583-584 (1938).

Since 1934, there have been very few attempts to enact graduated gross receipts taxes and the few such laws which were enacted having been uniformly held to be unconstitutional. In 1954, the Florida Supreme Court struck down a graduated gross receipts tax on the daily gross receipts of dog tracks on the authority of Stewart Dry Goods. See Volusia County Kennel Club, Inc. v. Haggard, 73 So. 2d 884 (Fla.1954). Similarly, in 1981, a New York court invalidated a graduated gross receipts tax on petroleum retailers who sold more than 60,000,000 gallons of petroleum in the preceding year, but not on those who sold less. See Merit Oil of New York, Inc. v. New York State Tax Commission, 111 Misc. 2d 118, 443 N.Y.S. 2d 604 (1981).[5]

In Trump v. Chu, 65 N.Y. 2d 20, 489 N.Y.S. 2d 455, 478 N.E.2d 971 (1985), the New York Court of Appeals explained:

> Stewart Dry Goods and Merit Oil stand for the proposition that gross receipts taxes that treat similarly situated taxpayers differently based on sales volume violated equal protections because they are imposed without regard to profits. Stated differently, Stewart holds that the Legislature may not classify

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[5]The New York Court of Appeals has pointed out that although the tax in Merit Oil was labeled a gross profits tax, it was actually a graduated gross receipts tax. See Trump v. Chu, 65 N.Y.2d 20, 489 N.Y.S.2d 455, 478 N.E.2d 971 (1985).

> taxpayers on the basis of gross receipts or sales volume for the purpose of imposing different tax rates and then utilize the amount of gross receipts to determine the amount of tax due as well.

Id. In short, after 1934, it became a settled principle of law that graduated gross taxes are per se unconstitutional.

In this case, the Minnesota Supreme Court circumvented these settled constitutional principles. While acknowledging that the decision in Stewart, "has remained intact all these years ...", it departed from Stewart because, "the graduated gross receipts tax is being applied to a class of taxpayer and to a type of transaction easily distinguishable from those present in Stewart ... ." The Court in Stewart, however, did not limit itself to the retail sales arena as the Minnesota Supreme Court suggests. Instead, it took into account a broad range of classes of taxpayers and types of transactions. The Stewart court focused on the unequal treatment of taxpayers in the same classification as the basis of its decision:

> "... the operation of the statute is unjustifiably unequal, whimsical, and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned."

Stewart, 294 U.S. at 557.

The Minnesota Supreme Court also attempted to distinguish Stewart because it claimed that unlike in Stewart, a reasonable relationship exists between the tax and its purpose in this case, namely, the state's interest in tight administrative controls over gambling generally. The Minnesota Court also

noted that another rational basis for the tax, "was to put a damper on commercialization of charitable gambling, to avoid the problems of integrity which may accompany ever-increasing gambling receipts, and to level the playing field between large and small operations." The "level the playing field" argument was presented to and rejected by this Court in Stewart. The Court noted:

> The suggestion is made that the ad valorem property tax heretofore laid on Kentucky merchants bears more heavily upon the little dealer than upon his bigger competitor, as the real estate and stock of merchandise of the former is greater in proportion to the business done than is the case with the latter. This fact may indeed be a proper reason for adjusting the tax burden so as better to reflect the fruits of the enterprise; but it can afford no excuse for an arbitrary and unequal imposition as between persons similarly circumstanced. The record fails to show that an income tax or a flat tax on sales would not accomplish the desired end. The adoption of laws of the latter description by many of the states is a practical confirmation of the view that they are effective measures.

Id. at 563.

Thus, the Minnesota Supreme Court not only failed to follow binding precedent of this Court, it attempted to justify its decision with arguments that were rejected by this Court in Stewart.

The question presented here is one of great practical importance. In 1934, this Court concluded that graduated gross receipts taxes were so inherently unfair as to be

unconstitutional. If the doctrine espoused by the Minnesota Supreme Court were to remain undisturbed, the states could enact graduated gross receipts taxes merely by excluding a portion of the taxpaying public. Thus, the prohibition against graduated gross receipts taxes would be effectively demolished.

The abuse inherent in graduated gross receipts taxes was apparent to this Court in 1934. The petition should be granted and this Court should send a clear message that attempts to introduce graduated gross receipts taxes through the back door will not be tolerated.

CONCLUSION

Petitioners respectfully submit that the Minnesota Supreme Court, by allowing a graduated gross receipts tax, has plainly failed to follow controlling authority and nearly sixty years of settled constitutional law. Petitioners respectfully request that this Court grant their petition for certiorari.

Daniel W. Schermer
1000 Northstar Center East
608 Second Avenue South
Minneapolis, Minnesota 55402
Telephone (612) 339-1400
Attorney I.D. No. 96556
Attorney for Petitioners

Dated: September 13, 1993.

State of Minnesota

In Supreme Court

C1-92-2474

Tax Court — Simonett, J.

Brainerd Area Civic Center, et al.,

Relators,

vs.

Filed May 7, 1993
Office of Appellate Courts

Commissioner of Revenue,

Respondent.

SYLLABUS

The graduated tax on gross receipts from pull-tabs and tipboards operated under the charitable gambling law does not violate the constitutional requirements of uniformity and equal protection.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

We uphold the constitutionality of a graduated "combined receipts" tax on certain kinds of charitable gambling and affirm the tax court.

Minn. Stat. § 349.212, subd. 6 was enacted in 1989. This statute applies to organizations engaged in legal charitable gambling and imposes a graduated tax on "combined receipts" derived from tipboard and pull-tab games in a given year.[1] There is no tax levied on an

[1] "Combined receipts" are defined in the statute as "the sum of the organization's gross receipts from lawful gambling less

organization's first $500,000 in gross income or receipts; thereafter, a 2-percent tax is levied on gross receipts from $500,000 to $700,000. From $700,000 to $900,000 the tax is $4,000 plus 4 percent of the amount over $700,000 but not over $900,000, and above $900,000 the tax is $12,000 plus 6 percent of the amount over $900,000.

Relators are charitable organizations operating pull-tab and tipboard games.[2] Having paid the "combined receipts" tax for the years in question, relators now seek a refund, claiming the tax is unconstitutional. The tax court ruled to the contrary, and the charitable organizations now bring the matter here on certiorari.

Relators' claim is that the combined receipts tax is unconstitutional "because it is a graduated gross receipts tax." They rely on a 1935 United States Supreme Court decision, *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935), which held that a Kentucky graduated gross receipts tax was unconstitutional because it violated the federal equal protection clause. In 1939, this court followed *Stewart* in *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *aff'd on remand*, 208 Minn. 607, 294 N.W. 230 (1940), by striking down a similar tax. The question before us, then, is whether *Stewart* is controlling, *i.e.*, whether the graduated gross receipts tax for pull-tabs and tipboards is the same kind of tax that was deemed constitutionally flawed in *Stewart* and *National Tea*.

In *Stewart*, the State of Kentucky had imposed a graduated gross receipts tax on all retailers, regardless

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gross receipts directly derived from the conduct of bingo, raffles, and paddlewheels***." This definition effectively subjects only gross receipts from pull-tabs and tipboards to the tax.

[2] Only an "organization" recognized under the charitable gaming law may operate pull-tabs, tipboards, paddlewheels, and bingo. An "organization" is defined as "any fraternal, religious, veterans, or other nonprofit organization." Minn. Stat. § 349.12, subd. 28 (1992).

of the type of merchandise they sold, their profit margin, or any other considerations. A levy of 1/20th of a percent was imposed on the first $400,000 in gross sales, and progressively higher levies on each additional $100,000 in sales, up to a full 1 percent on amounts over $1,000,000. The Court stressed that the tax was essentially a revenue measure based on the premise that the higher gross receipts of a business, the greater the likelihood of increased profits, and, consequently, an increased ability to pay more taxes. The Court concluded, however, that higher sales did not necessarily result in higher profits, certainly not on any uniformly progressive basis.[3]

While the *Stewart* holding has been criticized[4] and has engendered somewhat checkered progeny,[5] the

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[3] The court observed that "the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume." *Stewart*, 294 U.S. at 558-59.

[4] Justice Cardozo wrote a dissent in *Stewart*, which has received favorable comment, arguing that it is reasonable to believe that capacity to pay increases with an increase in receipts. *Stewart*, 294 U.S. at 570. *See, e.g.*, R. C. Brown, *Constitutional Limitations on Progressive Taxation of Gross Income*, 22 Iowa L. Rev. 246, 264-67 (1937).

[5] Cases following *Stewart* and invalidating a graduated gross receipts tax include *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954) (tax on dog racetrack receipts) and *Merit Oil of New York, Inc. v. New York State Tax Commission*, 111 Misc. 2d 118, 443 N.Y.S.2d 604 (1981) (tax on oil retailers imposed for sales of all products, including gas, gum, soda, cigarettes, etc.).

On the other hand, *Stewart* has been distinguished and not applied in cases where the tax has many of the attributes of a graduated gross receipts tax. *See, e.g., California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959) (graduated tax rates on the extraction and sale of crude oil held constitutional); *Welch v. Henry*, 305 U.S. 134 (1938) (allowing a graduated gross income tax less an arbitrary deduction of $750); *Paducah Automotive Trades Ass'n v. City of Paducah*, 307 Ky. 524, 211 S.W.2d 660

decision itself has remained intact all these years. In *National Tea Co. v. State*, *supra*, this court pointed out that Minnesota's graduated gross receipts tax on chain stores divided chain store merchants into 11 different classes based upon their volume of gross sales and imposed a different rate on each class. *Id.*, 205 Minn. at 445, 286 N.W. at 361. Concluding the tax was a levy on the privilege of doing business, our court found that the amount of the tax bore no reasonable relation to the value of the privilege. *Id.*, 205 Minn. at 448, 286 N.W. at 362. The tax, we said, was practically identical to the tax in *Stewart* and was, therefore, unconstitutional. *Id.*, 205 Minn. at 450, 286 N.W. at 363.

Historically, courts have begun their constitutional analysis of a particular tax by defining it as either an income tax, an occupation or excise tax, a sales tax, or property tax. A progressive income tax, with both the amount and the rate of the tax increasing with income, is permissible because based on ability to pay. A property tax, on the other hand, tends to be based on the value of the property taxed. A tax on gross receipts can be difficult to label, especially if graduated. *California Co. v. State*, 141 Colo. 288, 298-300, 348 P.2d 382, 388-89 (1959). It looks like an excise tax (a tax on the privilege of engaging in a particular occupation), yet the progressive gradations of the tax suggest that income generated by the gross receipts is also a factor. Our search, then, is not for a label, but rather to understand the distinctions created by the graduated classification scheme and to consider the genuineness and relevance of those distinctions. We might add that in tax legislation, when lines are drawn to classify taxpayers, it is enough if the lines are based on any reasonable, albeit approximate, measurement. *Hegenes*

(1948) (graduated tax on volume of gross receipts of trade or occupation upheld); and *Homestake Mining Co. v. Johnson*, 374 N.W.2d 357 (S.D. 1985) (holding constitutional what was effectively a graduated tax on extraction and sale of minerals).

v. State, 328 N.W.2d 719, 722 (Minn. 1983).

Here, plaintiffs assert that any graduated gross receipts tax is *per se* unconstitutional. Presumably, plaintiffs have in mind Justice Cardozo's dissent in *Stewart* wherein he characterized the Court's majority as "holding that a tax upon gross sales, if laid upon a graduated basis, is always and inevitably a denial of the equal protection of the laws, no matter how slight the gradient or moderate the tax." *Stewart*, 294 U.S. at 566. Subsequent cases seem to have treated this Cardozo characterization as containing some hyperbole. Thus some state courts have concluded that in certain situations a graduated gross receipts tax does not run afoul of *Stewart*. *See*, footnote 5, *supra*. In any event, we do not concern ourselves with the continued vitality of *Stewart*; it is enough for our purposes here that this case is clearly distinguishable from *Stewart*.

Here the graduated gross receipts tax is being applied to a class of taxpayer and to a type of transaction easily distinguishable from those present in *Stewart* and *National Tea*. What we have here are charitable organizations engaged in legalized gambling, two areas where the state has traditionally paid particularly close attention. These nonprofits do not exist to compete in the same sense as do profit-seeking businesses. To put it another way, although sometimes lost sight of, nonprofit charitable organizations do not exist to sell pull-tabs and tipboards; rather, legalized gaming is simply one of many fundraising options, an option which has been specially sanctioned by the state to allow nonprofits an additional opportunity to raise money for their primary function of service to their communities. The state does more than just license the sale of a chance to win on a pull-tab; it also takes a direct regulatory role in the relationship of gross receipts to profitability, as well as in specifying the appropriate uses for the proceeds. Thus, "[a]n organization's net profits from gambling (gross receipts minus prizes) can be used only for three things:

payment of expenses, payment of gambling taxes and contributions for 'lawful purposes.'" Minn. House of Rep. Research Dept., *Charitable Gambling in Minnesota* 5 (rev. ed. Oct. 1989). The expenses that may be deducted are defined by the Gambling Control Board; and, by law, no more than 50 percent of gross profit from pull-tabs and tipboards may be expended for allowable expenses. Minn. Stat. § 349.15 (1992). The "lawful purposes" for which net profits may be spent are also defined. Minn. Stat. § 349.12, subd. 25 (1992).

In light of the charitable nature of the gambling organizations here and the state's interest in tight administrative controls over gambling generally, there is a reasonable relationship between the gross receipts and tax rates applied to each subclass defined by this tax, unlike *Stewart*. There, the tax was levied on for-profit, heterogeneous retailers selling a wide assortment of products at varying prices in classic business competition differing significantly from the "combined receipts" tax challenged here.

In *Stewart*, the Court worried that the graduated gross receipts tax impeded commerce. In this case, however, one of the announced purposes of the graduated gross receipts tax is precisely "to prevent commercialization." Significantly, the opening section of the charitable gambling chapter states that the purpose of sections 349.11 to 349.22 is "to regulate lawful gambling to prevent its commercialization, to insure integrity of operations, and to provide for the use of net profits only for lawful purposes." Minn. Stat. § 349.11 (1992).

This regulatory feature of the "combined receipts" tax is another important distinction. In none of the cases invalidating a graduated gross receipts tax called to our attention were any nonrevenue based policy interests advanced as a rationale for their imposition. Here, however, in addition to raising revenue, it appears another purpose of the combined receipts tax -- as important as raising revenue, if not more so -- was to

put a damper on commercialization of charitable gambling, to avoid the problems of "integrity" which may accompany ever-increasing gambling receipts, and to level the playing field between large and small operations. Large operators, benefiting by economies of scale, are able to offer larger prize pay-outs and to secure better locations for their booths, thereby gaining a competitive advantage over the smaller operators. The progressive feature of the "combined receipts" tax tends to reduce the competitive advantage of the large operators.[6] No one disputes this is a legitimate state purpose; indeed, it appears even more legitimate in light of the fact that the gambling in question is allowed in order to create an additional resource for a variety of charitable organizations, both large and small.

Volusia County Kennel Club v. Haggard, 73 So.2d 884 (Fla. 1954), deserves a comment because it highlights the distinguishing features of our state's gambling tax. There, the Florida Supreme Court struck down as unconstitutional a graduated tax on the daily gross receipts of dog-racing tracks. As relators point out, the Florida tax was on receipts of a regulated gambling activity, as in our case here. In *Volusia*, however, the dog tracks were operated as for-profit businesses, not as a means of charitable fundraising, and the tax, furthermore, was said to have only a revenue-producing purpose.

We should also mention another issue raised by relators. The trial court received an affidavit from the

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[6] "There are over 2,500 organizations licensed in the state to conduct charitable gambling. They vary in size from an organization with over $27 million in gross sales in 1988 to several hundred with under $25,000 in sales. The figures are dominated by a relatively small number of organizations with substantial sales. 159 organizations reported sales of over $1 million and these groups accounted for over one-third of the year's gross receipts even though they represented less than one-tenth of the total licenses issued." Minn. House of Rep. Research Dept., *Charitable Gambling in Minnesota* 9 (rev. ed. Oct. 1989).

Supervisor of Revenue Planning and Research for the Department of Revenue, in which the supervisor stated one of the legislative reasons for enacting the "combined receipts" tax was to level the playing field for large and small operators. Relators say it was error to receive this affidavit. Not so. The affidavit was not offered as evidence of legislative intent to construe a statute's ambiguity (for there is none), but rather to inform the court of some possible conceivable state interests which may have motivated the legislation. In equal protection analysis, a conceivable and legitimate reason for the legislative classification may provide the rational basis to satisfy the constitutional requirement of equality and uniformity for tax legislation; the affidavit was relevant on that constitutional issue. *See, e.g., Rio Vista Non-Profit Housing Corp. v. Ramsey County*, 335 N.W.2d 242, 245-46 (Minn. 1983), *appeal dismissed*, 464 U.S. 1033 (1984).

If the "combined receipts" tax survives *Stewart* and *National Tea*, as we so hold, we need carry our equal protection analysis no further. If the tax passes muster under *Stewart* and *National Tea*, it also passes muster under our rational basis test because, as the foregoing discussion demonstrates, the same test is involved. *See, e.g., Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn. 1980); *Rio Vista Non-Profit Housing Corp. v. Ramsey County*, *supra*.

The decision of the tax court upholding the constitutionality of the Minnesota Combined Receipts Tax is affirmed.

Affirmed.

STATE OF MINNESOTA

☒ **Supreme Court**

☐ **Court of Appeals**

Brainerd Area Civic Center, et al.,
Relators

vs.

Commissioner of Revenue,
Respondent.

JUDGMENT

C1-92-2474
Appellate Court Case Number

6146
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the decision of the Minnesota Tax Court dated October 20, 1992 *be and the same hereby is*

affirmed

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and Signed:
FOR THE COURT June 15, 1993 *By:* SS
Date *Assistant Clerk*

Form APL. 31GA

No. 93-409

Supreme Court, U.S.
FILED
OCT 15 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BRAINERD AREA CIVIC CENTER, BRAINERD AMATEUR HOCKEY ASSOCIATION, NATIONAL EXCHANGE CLUB OF LITTLE FALLS, LITTLE FALLS YOUTH HOCKEY ASSOCIATION, SKI GULL, INC., MARCH OF DIMES, CLIMB, INC., CEDAR RIVERSIDE PEOPLE'S CENTER AND EXCHANGE CLUB OF SOUTHWEST MINNEAPOLIS,

Petitioners,

v.

COMMISSIONER OF REVENUE, STATE OF MINNESOTA,

Respondent.

MINNESOTA MULTIPLE SCLEROSIS SOCIETY AND EPILEPSY FOUNDATION OF MINNESOTA, INC.,

Petitioners,

v.

COMMISSIONER OF REVENUE, STATE OF MINNESOTA,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
THOMAS K. OVERTON*
Assistant Attorney General

Tax Litigation Division
10 River Park Plaza
Saint Paul, Minnesota
55146 0600
(612) 296-0985

Attorneys for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the decision of the Minnesota Supreme Court upholding the constitutionality of a graduated tax on receipts from highly regulated, not-for-profit charitable gambling operations conflict with the decision of this Court in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935)?

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 499 N.W.2d 468 (1993) and is reproduced in the appendix to the petition. The Minnesota Supreme Court affirmed the decision of the Minnesota Tax Court. The Tax Court decision is not officially reported, but is available in the Westlaw electronic data base at 1992 WL 297620.

STATEMENT OF THE CASE

Petitioners are charities conducting lawful gambling operations within Minnesota under chapter 349 of the Minnesota Statutes. Their activities include operating pull-tab and tipboard games.[1]

Respondent is the tax administrator for the State of Minnesota.

Under Minnesota law, only charities and similar organizations may conduct lawful gambling (also called charitable gambling).[2] The only forms of gambling that

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[1] A pull tab game consists of a set of individual sealed tickets with hidden symbols. One or more tickets has been designated in advance as a winner. A player purchases a ticket and removes the seal to discover if he is a winner. A tipboard is a board marked with a grid. Each section of the grid contains hidden symbols, one or more of which has been designated in advance as a winner. A player purchases the right to remove the cover from a section to discover if he is a winner.

[2] Organizations which may conduct charitable gambling are fraternal, religious, veterans, and other nonprofit organizations. Minn. Stat. §§ 349.16 and 349.12, subd. 28 (1992).

are permitted are bingo, raffles, paddlewheels, pull-tabs and tipboards. Minn. Stat. §§ 349.16 and 349.12, subd. 24 (1992). Gambling activities are highly regulated and controlled for the express purpose of preventing their commercialization, insuring the integrity of operations, and insuring the use of profits only for specifically permitted purposes. Minn. Stat. ch. 349 and § 349.11 (1992).

Minnesota Statutes chapter 349 also provides for the taxation of gambling. Minn. Stat. § 349.212, subd. 6 (1992) imposes a graduated tax on the "combined receipts" of each gambling operator. By definition "combined receipts" is essentially the gross receipts from tipboards and pull-tab gambling.[3]

The tax is graduated according to the amount of the gambling operator's combined receipts for the year. No tax is imposed on the organization's first $500,000 of gross receipts. A two percent tax rate is imposed on the operator's gross receipts in excess of $500,000 but less than $700,000. A four percent tax is imposed on gross receipts in excess of $700,000 but less than $900,000. A six percent tax is imposed on the operator's gross receipts in excess of $900,000.

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[3] "Combined receipts" is the sum of an operator's gross receipts from lawfull gambling less the receipts directly derived from the conduct of bingo, raffles, and paddlewheels. Minn. Stat. § 349.212, subd. 6 (1992). "Gross receipts" from "lawful gambling" consists of all receipts from bingo, raffles, paddlewheels, tipboards, pull-tabs, admissions, and accumulations (such as interest) on gambling proceeds. Minn. Stat. § 349.12, subds. 21 and 24 (1992).

Petitioners attacked the combined receipts tax in the Minnesota Tax Court asserting, among other things, that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as construed in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935). Petitioners claim a refund of all combined receipts taxes paid since October, 1989, when the tax on pull-tabs and tipboards was changed from a tax on gross receipts less prizes to the combined receipts tax. The Minnesota Tax Court affirmed the constitutionality of the tax, holding that *Stewart Dry Goods* was distinguishable and did not govern this case. On certiorari to the Tax Court, the Minnesota Supreme Court affirmed, again distinguishing *Stewart Dry Goods*.

REASONS FOR DENYING THE PETITION

Respondent Commissioner of Revenue, State of Minnesota respectfully requests that this Court deny the Petition For Writ of Certiorari seeking review of the Minnesota Supreme Court's decision in this case.

I. THE DECISION OF THE MINNESOTA SUPREME COURT IN THIS CASE DOES NOT CONFLICT WITH THE DECISION IN *STEWART DRY GOODS*.

Contrary to Petitioner's argument, this case is not identical to *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935), and the Minnesota Supreme Court's decision in this case does not conflict with this Court's decision in *Stewart*. The Minnesota Supreme Court correctly determined that this case is distinguishable from *Stewart Dry*

Goods.[4] Because the Minnesota Supreme Court's decision does not conflict with *Stewart* or any other binding precedent, the petition should be denied.

A. Unlike The Gross Receipts Tax In *Stewart Dry Goods*, Minnesota's Combined Receipts Tax Is Not A General Business Tax, But Is Imposed Only On Licensed Charitable Gambling Operations Whose Sales, Prizes, Overhead, And Operating Expenses Are Strictly Regulated.

In *Stewart Dry Goods* this Court held that a Kentucky graduated gross sales tax on retailers was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Kentucky sales tax was imposed on all retailers, including all types of organizations, all methods of merchandising, and all types of commodities sold. 294 U.S. at 556. This Court concluded that the facts

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[4] At the same time and as part of the same analysis the Minnesota Supreme Court distinguished its own decision in *National Tea Co. v. State*, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *reinstated on remand*, 294 N.W. 230 (1940) (per curiam). In that case the Minnesota Supreme Court struck down a graduated gross receipts tax on chain stores. The Minnesota Court described the tax as practically identical to the tax invalidated in *Stewart Dry Goods* and also cited *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936) (per curiam), which affirmed the invalidity of a graduated tax based on gross receipts from sales. In *National Tea*, this Court granted certiorari and vacated the decision to permit the Minnesota Court to clarify whether it had relied solely on federal equal protection as construed in *Stewart Dry Goods*, or whether it had also relied on independent state uniformity guaranties. On remand the Minnesota Supreme Court reaffirmed that it had also relied on the independent state grounds.

did not support Kentucky's contention that the graduation of the sales tax reasonably approximated net earnings and ability to pay. *Id.* at 558. Nor did the facts support the conclusion that there was even rough proportionality, within wide limits of tolerance, between gross sales and net profits or net worth. *Id.* at 559. The Court observed that net profits vary with the character of the business, with different kinds of merchandise, and from year to year in the same enterprise as well as by volume. *Id.* at 558-59. This Court concluded that "the graduated rates imposed were not intended to bear any relation to net profits." *Id.* at 559.

In contrast to the Kentucky tax considered in *Stewart*, the Minnesota tax is imposed under conditions where there is a much more direct relationship between gross receipts, net profits, and ability to pay and where gross receipts is a good measure of the relative power of the organizations. The Minnesota tax is imposed only upon a particular activity (the sale of pull-tabs and tipboards) on a non-commercial basis by a particular type of entity (charities and nonprofits). This charitable gambling activity occurs under closely licensed and regulated conditions.

The following examples indicate the scope and detail of the regulation. As previously noted, only charities and other nonprofits can sell pull-tabs and tipboards. Regulations limit the price of pull-tabs and tipboards ($2.00) and limit the prizes per winning ticket (pull-tabs = $250; tipboards = $500). The overhead and operating expenses are regulated. Only specified expenses related to gambling operations can be paid from gambling proceeds. Some related expenses cannot be paid from gambling

receipts (*e.g.*, advertising), and some are limited in amount (rent). Total expenses are limited to 50% of gross profits. After tax profits from charitable gambling can, as the name implies, only be used for charitable activities. Detailed monthly reports of charitable gambling activity must be filed.

Under these strictly controlled conditions, and from analysis of the filed reports, the Minnesota Legislature could rationally conclude that gambling operators with large gross receipts had lower expenses per dollar of gross receipts, greater net income, and greater ability to pay. The legislature could also reasonably conclude that such operators had greater economic power, both because of their larger net income and because of their larger share of the overall charitable gambling activity.

A second factor distinguishing this case from *Stewart Dry Goods* is that in *Stewart Dry Goods* the impact of the Kentucky tax on the conduct of commerce was of concern. In contrast, lawful gambling in Minnesota is limited to charitable and non-profit organizations and is intended to be a non-commercial method of raising funds for a myriad of charitable activities.

B. Minnesota's Combined Receipts Tax Serves Regulatory As Well As Revenue Raising Purposes.

The third factor distinguishing this case from *Stewart Dry Goods* is that the Kentucky tax considered in *Stewart Dry Goods* was a revenue measure without regulatory purpose. 294 U.S. at 555 (Kentucky statute essentially a revenue measure, not a police regulation). In contrast,

Minnesota, had both a revenue purpose and an equally important regulatory purpose in adopting the combined receipts tax.

Gambling is an area of significant public concern and the states have wide latitude to determine whether it will occur and, if so, how it will be controlled, regulated, and taxed. Minnesota has determined that gambling within the state is to be conducted as a mild form of entertainment to raise money for charitable activities. It is not to be a commercial activity. Appendix pages 5-7. Further, Minnesota had before it specific facts showing that its previous method of taxing the net after deducting prizes was encouraging increased total prizes and increased gambling, but a smaller share for taxes and charitable activities. Supplemental Appendix (hereinafter "Supp. App.") pages 2-4. In enacting the combined receipts tax, Minnesota intended to further its stated purpose of preventing commercialization and to ameliorate the growing dominance of large gambling operators. It acted to preserve lawful gambling as an additional funding resource for a variety of charitable activities, both large and small, as well as to increase public revenue. This purpose is clearly promoted by the tax, and, in this case, the effectiveness of the tax in achieving this regulatory purpose is confirmed by the record. Supp. App. 7-8.

C. Because Minnesota's Combined Receipts Tax Effectively Allows A Deduction Of $500,000 From Gross Receipts, It Is Not A Tax On Gross Receipts.

The final distinction between this case and *Stewart Dry Goods* is that the Kentucky tax considered in *Stewart*

Dry Goods did not allow any deduction in determining the amount of taxable sales and taxed all sales. In contrast, Minnesota does not impose any tax on the first $500,000 of combined receipts. Each charitable gambling operator effectively is permitted to deduct $500,000 from its combined receipts in determining its tax. Thus, Minnesota's combined receipts tax is in this respect a "net" tax, taxing only the amount in excess of $500,000.

In this respect Minnesota's tax is like the graduated tax on dividends received which was approved in *Welch v. Henry*, 305 U.S. 134 (1938). In that case the taxable amount was the dividends received less an arbitrary deduction of $750. Although the appellant had urged that the tax was invalid under *Stewart Dry Goods*, the tax was upheld without comment on that point.

The foregoing shows that *Stewart Dry Goods* is factually and legally distinguishable from this case. The decision of the Minnesota Supreme Court therefore does not conflict with a controlling decision of this Court.

II. THE *STEWART DRY GOODS* DECISION HAS NOT BEEN EXPANDED BY THIS COURT TO OTHER GROSS RECEIPTS TAXES AND ITS HOLDING HAS BEEN DISTINGUISHED MANY TIMES.

Following the decision in *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936) (per curiam), *Stewart Dry Goods* has been distinguished by this Court and has not been broadly applied or expanded. *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), upheld a graduated license tax based upon the number of stores in the chain. *New York Rapid Transit Corp. v. City of New York*, 303

U.S. 573 (1938), held that *Stewart Dry Goods* did not bar a flat gross receipts tax. It also cited with approval the decision in *Clark v. City of Titusville*, 184 U.S. 329 (1902), and stated that gross receipts from an occupation constitute an appropriate measure of the privilege of engaging in that occupation. *New York Rapid Transit*, 303 U.S. at 583.

There are, in addition, numerous decisions of this Court upholding graduated taxes which predate *Stewart Dry Goods*. *Stewart Dry Goods* either distinguished these cases or did not specifically address them. Many are cited in *Stewart Dry Good's* strong dissent by Justice Cardozo, joined by Justices Brandeis and Stone. These cases indicate additional grounds which distinguish *Stewart Dry Goods*. *See e.g., Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935) (upholding graduated license tax on chain stores base upon the number of stores); *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269 (1925) (upholding graduated tax on canning factories based upon cases packed); *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916) (upholding graduated income tax rates); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61 (1913) (upholding graduated theater license tax based upon ticket prices); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (upholding graduated inheritance tax rates).

State courts have also distinguished *Stewart Dry Goods*. In *Heyman v. Mahin*, 275 N.E.2d 421 (Ill. 1971), *cert. denied*, 405 U.S. 1075 (1972), and in *S. Bloom, Inc. v. Mahin*, 329 N.E.2d 213 (Ill. 1975), the Illinois Supreme Court upheld an inversely graduated discount for cigarette tax, distinguishing *Stewart Dry Goods*. In *Bloom*, the tax discount rate (allowed to cigarette distributors for the cost of collecting the tax) decreased as the volume of sales

increased. Thus, the rate of tax required to be remitted to the state increased as the volume of sales increased.[5]

California Co. v. State, 348 P.2d 382 (Colo. 1959), *appeal dismissed*, 364 U.S. 285 (1960), upheld a graduated gross receipts tax on gross income derived form production of oil and gas. After extensively reviewing the case law, including *Stewart Dry Goods*, the court concluded that the federal authorities did not require that the tax be held invalid. The court also observed that, as in this case, and unlike the tax in *Stewart Dry Goods*, the Colorado tax applied only to one type of activity. 348 P.2d at 394-95.

Homestake Mining Co. v. Johnson, 374 N.W.2d 357 (S.D. 1985) upheld a graduated tax on gross receipts from mining based upon the amount mined. The court distinguished *Stewart Dry Goods* and stated that the frequency and character of the mining were permissible grounds to justify graduation of the tax.

Paducah Automotive Trades Ass'n v. City of Paducah, 211 S.W.2d 660 (Ky. 1948), upheld a graduated license tax based upon the volume of gross receipts. The court distinguished *Stewart Dry Goods*, but its analysis is unclear because the ordinance is not contained in full in the opinion.

Finally, the use of graduated tax rates in other areas suggests that there are additional circumstances to which the holding in *Stewart Dry Goods* does not apply. *See, e.g.*, 26 U.S.C.A. § 2001 (Supp. 1993) (estate taxes); Minn. Stat.

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[5] For example, for the first $700,000 of tax, the distributor was required to remit 97-7/9% of the tax. For the next $700,000 of tax, the distributor was required to remit 98-2/9% of the tax.

§ 290.06, subd. 1 (1986) (corporate franchise taxes); Minn. Stat. § 295.34 (1990) (gross earnings taxes); 26 U.S.C.A. § 4001 (Supp. 1993) (luxury tax on vehicles).

In summary, there are ample factual and legal bases to distinguish *Stewart Dry Goods* from this case. Because *Stewart Dry Goods* has not been expanded and there is no direct conflict between this case and *Stewart Dry Goods*, there is no compelling federal issue to be decided by this Court. The regulation and taxation of charitable gambling is therefore best left to the states.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

THOMAS K. OVERTON*
Assistant Attorney General

Tax Litigation Division
10 River Park Plaza
Saint Paul, Minnesota 55146-0600
(612) 296-0985

Attorneys for Respondent

*Counsel of Record

CASE TYPE: OTHER CIVIL

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brainerd Area Civic Center, Brainerd Amateur Hockey Association, National Exchange Club of Little Falls, Little Falls Youth Hockey Association, Ski Gull, Inc., March of Dimes, Climb, Inc., Cedar Riverside People's Center, and Exchange Club of S.W. Minneapolis,

Plaintiffs,

vs.

Commissioner of Revenue,

Defendant.

Court File No.
MC 92-005324

AFFIDAVIT OF DENNIS J. ERNO IN SUPPORT OF DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Minnesota Multiple Sclerosis Society and Epilepsy Foundation of Minnesota, Inc.,

Plaintiffs,

vs.

Commissioner of Revenue,

Defendant.

Court File No.
MC 92-005325

STATE OF MINNESOTA)
) ss:
COUNTY OF RAMSEY)

DENNIS J. ERNO, states the following under oath:

1. I make this affidavit from my own personal knowledge and from official records and reports by the Department of Revenue and other State agencies.

2. I am presently the Supervisor of Revenue Planning and Research for the Minnesota Department of Revenue.

3. In 1989 I was the Assistant Commissioner of Revenue responsible for Local Government Services and Special Taxes, including the taxes on lawful gambling (also called charitable gambling).

4. In 1980 I participated with the Governor's Office, the House, the Senate and representatives of the lawful gambling organizations during the regular legislative session and special session in the consideration of lawful gambling tax and regulatory issues.

5. The following information, derived from analysis of reports filed by lawful gambling operators, from representatives of the association of lawful gambling organizations (to which the plaintiffs to this action belonged), and from representatives of lawful gambling operators was considered by the Department of Revenue, the Governor's Office, the Senate and the House in formulating the statutes enacted in 1989:

a. Gross receipts are the most common and widely recognized measure of the comparative size of lawful gambling operations.

b. The expenses (including fixed costs) of the lawful gambling operators having larger

gross receipts ("larger operations") comprised a smaller percentage of their gross receipts than average.

c. The expenses (including fixed costs) of the lawful gambling operators having smaller gross receipts ("smaller operators") comprised a larger percentage of their gross receipts than average.

d. Larger operators were able to spread fixed costs over greater sales volume, they had economies of scale, they had more bargaining power, and they had professional management rather than relying on volunteers.

e. Because larger operators had lower expenses per dollar of gross receipts, they were able to pay-out and did pay-out more prize money per dollar of gross receipts than average. Smaller operators were unable to match the price pay-outs of the larger operators because of their higher expenses.

f. Customers tended to patronize gambling operations where the prize money pay-outs were higher.

g. Larger operators could and did outbid smaller ones for prime gambling locations.

h. Higher prize money pay-outs lowered the percentage of gross receipts paid in taxes and the percentage of gross receipts available for charitable activity.

i. An increasing share of gross receipts were captured by larger operators and larger operators were becoming more dominant.

j. Community based gambling operators tended to be smaller operators.

k. the forecast for lawful gambling activity was for annual growth of one percent or less because lawful gambling activity had leveled off and new forms of gambling activity (the state lottery and Indian casino gambling) were expected to compete with lawful gambling.

6. The Governor's Office and the legislature considered applying the sales tax to gross receipts from lawful gambling. However this was rejected as detrimental to the smaller operators.

7. The graduated combined receipts tax was intended to raise tax revenues and to ameliorate the trend toward dominance by the larger gambling operators.

8. The graduated combined receipts tax was intended to take from the larger operators a larger portion of their lawful gambling gross receipts in taxes and to force larger gambling operators to lower their prize pay-outs.

9. Attached as Exhibit A and incorporated herein is the House Research Information Brief entitled "Charitable Gambling in Minnesota," revised June 1988, that briefly summarizes some information about lawful gambling. It was a source of information for those participating in the formulation of the 1989 laws affecting lawful gambling.

10. Attached as Exhibit B and incorporated herein is the House Research Information Brief entitled "charitable Gambling in Minnesota" revised October, 1989. It is a revision of the prior report that reflects laws enacted in 1989.

11. Attached as Exhibit C and incorporated herein are graphs of Gross Revenues/Consumer Losses After Prize Payouts by Type of Gambling.

12. Attached as Exhibit D and incorporated herein is a graph of lawful gambling (charitable gambling) gross receipts by quarter.

13. Attached as Exhibit E and incorporated herein is a table of lawful gambling gross receipts, prizes, net receipts, taxes, expenses and net proceeds.

/s/ Dennis J. Erno
DENNIS J. ERNO

Subscribed and sworn to before
me on May 15th, 1992.

/s/ Cheryl J. Neary
Notary Public

[stamp]
CHERYL J. NEARY
Notary Public – Minnesota
Ramsey County
My commission expires Oct. 21, 1993

[Attached Exhibits Are Omitted
From This Supplemental Appendix]

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

Brainerd Area Civic Center, Brainerd Amateur Hockey Association, National Exchange Club of Little Falls, Little Falls Youth Hockey Association, Ski Gull, Inc., March of Dimes, Climb, Inc., Cedar Riverside People's Center, and Exchange Club of S.W. Minneapolis,

Plaintiffs,

vs.

Commissioner of Revenue,

Defendant.

Court File No.
MC 92-005324

AFFIDAVIT OF WILLARD M. MUNGER, JR.

Minnesota Multiple Sclerosis Society and Epilepsy Foundation of Minnesota, Inc.,

Plaintiffs,

vs.

Commissioner of Revenue,

Defendant.

Court File No.
MC 92-005325

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Willard M. Munger, Jr., being first duly sworn, states and deposes as follows:

1. I am the Executive Director of the Minnesota Multiple Sclerosis Society ("M.S. Society") and make this affidavit in support of plaintiffs' motion for summary judgment.

2. The M.S. Society is a charitable organization devoted to research, education, care and treatment with respect to multiple sclerosis and related disabilities.

3. For a number of years, the M.S. Society has conducted lawful gaming activities throughout the state. The proceeds from those activities are used to fund our programs of research, care and treatment of the disabled throughout Minnesota.

4. The combined receipts tax enacted by the Legislature has had a disastrous effect on both the M.S. Society and the people it serves. During the fiscal year ending September 30, 1989, the M.S. Society had gross receipts from charitable gaming (largely from pulltabs) of approximately $40,000,000. This generated a profit of $2.1 million which was applied to the Society's charitable mission.

5. The combined receipts tax went into effect on October 1, 1989. This had an immediate and drastic effect on our operations. By the end of the fiscal year ending

9-30-91, our annual revenues from charitable gaming had decreased to $25.6 million and our profits had decreased to $1.3 million.

6. We tried strenuously to make up the deficit from other sources. Despite some significant increases in revenues from non-gaming sources, we were forced to make cutbacks of approximately $750,000 in our services to the disabled.

7. The reason for the drastic decrease in revenues is very simple. Before the combined receipts tax went into effect, the payout on pulltabs was approximately 85%. If we had maintained the same payout level after the tax went into effect, we would have been operating at a loss. Accordingly, we were forced to reduce the payout to our customers in order to generate funds to pay the tax. Since virtually all of our receipts are taxed at the highest rate, we were forced to reduce our payout more than anyone else.[1] Our customers quickly discerned this and simply took their business elsewhere.

8. The loss of business also had a drastic effect on the tax revenues collected by the State. As can be seen from the following table, the combined receipts taxes which we paid to the State of Minnesota, dropped from approximately $180,000 per month when the tax was enacted to approximately $135,000 per month when we filed our claim for a refund:

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[1] In contrast, a small gaming operation, with revenues of less than $500,000 would have incurred no tax and would not have had to reduce its payout at all.

Month	Amount
Oct. 89	$180,741
Nov. 89	$194,737
Dec. 89	$173,451
Jan. 90	$178,228
Feb. 90	$155,192
Mar. 90	$184,501
Apr. 90	$169,714
May 90	$162,734
Jun. 90	$156,961
Jul. 90	$115,900
Aug. 90	$141,630
Sep. 90	$139,459
Oct. 90	$135,824
Nov. 90	$133,252
	$2,222,324

FURTHER AFFIANT SAYETH NOT.

Dated: April 23, 1992

/s/ Willard M. Munger, Jr.
Willard M. Munger, Jr.

Subscribed and sworn to before
me this 23rd day of April, 1992.

/s/ Daniel W. Schermer
Notary Public

[stamp]
DANIEL W. SCHERMER
Notary Public, Hennepin County, Mn
My commission expires Apr. 1, 1993